

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JENNIFER FRANET, )  
)  
Plaintiff(s), )  
)  
v. )  
)  
COUNTY OF ALAMEDA SOCIAL )  
SERVICES AGENCY, et al., )  
)  
Defendant(s). )  
\_\_\_\_\_ )

No. C 02-3787 MJJ (BZ)

**REPORT AND RECOMMENDATION TO  
GRANT IN PART AND DENY IN  
PART PLAINTIFF'S MOTION FOR  
ATTORNEYS' FEES**

On May 25, 2006, the Honorable Martin J. Jenkins referred to me for a report and recommendation plaintiff's motion for attorneys' fees and costs, which came on for hearing July 19, 2006. Plaintiff requests \$666,987.39 in attorneys' fees and costs pursuant to 42 U.S.C. § 1988, which provides that the court, in its discretion, may allow the prevailing party in federal civil rights actions reasonable attorneys' fees as part of its costs.<sup>1</sup> The \$666,987.39 figure includes the lodestar amount, which reflects all of the hours plaintiff's attorneys claim they reasonably spent in litigating the case

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<sup>1</sup> The amount without any enhancements to plaintiff's attorneys' hourly rates is \$572,416.14. Plaintiff also requests approximately \$60,000 in attorneys' fees for work done from the time of the filing of this motion.

1 multiplied by a reasonable hourly rate, and an enhancement to  
2 their hourly rates to adjust for such factors as the  
3 contingent nature of the fee arrangement and the public  
4 interest involved. Defendants claim plaintiff's attorneys'  
5 hourly rates are excessive and should not include any  
6 enhancement, the hours worked are excessive and improperly  
7 include tasks performed for unsuccessful claims and any fees  
8 for plaintiff's experts in connection with her motion should  
9 be disallowed.

10 "The most useful starting point for determining the  
11 amount of a reasonable fee is the number of hours reasonably  
12 expended on the litigation multiplied by a reasonable hourly  
13 rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). As  
14 the party seeking attorneys' fees, plaintiff bears the burden  
15 of submitting evidence to support the hours worked and rates  
16 claimed. Hensley, 461 U.S. at 433.

17 The purpose of awarding attorneys' fees in civil rights  
18 cases is to promote the vigorous enforcement of civil rights  
19 laws by assuring that an attorney who wins such a case will  
20 receive a reasonable fee. Corder v. Gates, 947 F.2d 374, 383  
21 (9th Cir. 1991). The starting point for determining a  
22 reasonable fee is the hourly rate counsel would have charged  
23 had the client been able to pay the attorney's usual rate.  
24 Gusman v. Unisys Corp., 986 F.2d 1146, 1149-50 (7th Cir.  
25 1993); Columbus Mills, Inc. v. Freeland, 918 F.2d 1575, 1580  
26 (11th Cir. 1990)("evidence of a fee structure arrived at by  
27 private parties negotiating at arms length is highly  
28 persuasive" evidence of prevailing market norms). Obviously

1 if an attorney can get her usual hourly rate, that factor  
2 alone should encourage her and certainly not deter her from  
3 taking the case. Other factors that may discourage her from  
4 taking the case, thereby obstructing the enforcement of civil  
5 rights laws, can be dealt with through a multiplier or  
6 enhancement. Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d  
7 1041, 1045 (9th Cir. 2000). At oral argument, Ms. Kaminer  
8 stated that had plaintiff been wealthy and able to pay, she  
9 would have charged her \$350 per hour. Mr. Pyle said he would  
10 have asked for \$400 per hour. These rates are reasonable and  
11 in line with prevailing market rates in the San Francisco Bay  
12 Area. Hicks Decl. ¶¶ 20, 21; Pearl Decl. ¶ 8. Plaintiff's  
13 counsel have requested hourly rates of \$410 for Ms. Kaminer  
14 and \$450 for Mr. Pyle, but no reason exists to give more than  
15 the hourly rates they would have charged a wealthy plaintiff.<sup>2</sup>  
16 Therefore, I recommend Ms. Kaminer and Mr. Pyle receive hourly  
17 rates of \$350 and \$400, respectively, instead of their  
18 requested rates. For similar reasons, I recommend granting  
19  
20

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21 <sup>2</sup> Plaintiff's reliance on statements in Blum v.  
22 Stenson, 465 U.S. 886 (1984) and other cases that fees should  
23 be based on prevailing market rates for complex federal  
24 litigation is misplaced. Plaintiff's counsel are not being  
25 awarded a below market hourly rate they customarily charge  
26 people who are poor and cannot afford to pay prevailing rates.  
27 Id. at 895-96. They are being awarded a rate they would have  
28 charged a wealthy client. Likewise, defendants are mistaken  
when they contend that the prevailing rate should be that  
charged by small firms who do primarily civil rights work. See  
Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516,  
1520 (D.C. Cir. 1988)(refusing "to create a cap" for the  
services of private practice public interest attorneys who  
intentionally charge their poorer clients reduced rates, as  
plaintiff's counsel have declared they do).

1 the requested hourly rates of \$350 for David Beauvais,<sup>3</sup> \$520  
2 for David Hicks and \$110 for Mr. Hicks' paralegal, which  
3 appear to be the rates they actually charge for their work.  
4 Hicks Decl. ¶ 11. See Miller v. Vicorp Restaurants, Inc.,  
5 2006 WL 212021, at \* 3 (N.D. Cal. Jan. 11, 2006)(awarding  
6 paralegals reasonable rates ranging from \$115 to \$130 per  
7 hour).

8 The parties provided very little briefing on the  
9 enhancement issue. Plaintiff asserts that her attorneys are  
10 entitled to an enhancement, not in the form of a multiplier,  
11 which is more common, but in the form of a \$75 increase to Mr.  
12 Pyle's and Ms. Kaminer's hourly rates. She does not cite any  
13 examples which allow this form of enhancement. Defendants  
14 argue that since plaintiff's attorneys are not entitled to the  
15 hourly rates they request, they are certainly not entitled to  
16 any enhancement.

17 After determining the lodestar amount, a court may  
18 enhance or reduce such amount based on an evaluation of a  
19 variety of factors not subsumed in the initial calculation of  
20 the lodestar. Van Gerwen, 214 F.3d at 1045-47 (listing  
21 factors relevant to the determination of the amount of  
22 attorneys' fees: (1) the time and labor required, (2) the  
23 novelty and difficulty of the issues, (3) the skill needed to

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24 <sup>3</sup> Defendants challenge Mr. Beauvais' requested rate  
25 because they contend that calculating values gleaned from an  
26 attorney lien filed on May 24, 2004 yields a rate of \$250.  
27 Unfortunately, Mr. Beauvais has not provided his usual rates.  
28 He seems to have been involved only at the beginning of the  
case until Ms. Kaminer replaced him. I am familiar with Mr.  
Beauvais from other matters and recommend he receive the same  
hourly rate as Ms. Kaminer, \$350.

1 perform the legal service properly, (4) the preclusion of  
2 other employment due to acceptance of the case, (5) the  
3 customary fee, (6) time limitations imposed by the client or  
4 the circumstances, (7) the amount involved and results  
5 obtained, (8) the experience, reputation and ability of the  
6 attorneys, (9) the "undesirability" of the case, (10) the  
7 nature and length of the relationship with the client, and  
8 (11) awards in similar cases). Considering these factors, I  
9 recommend that plaintiff's attorneys receive an enhancement.  
10 Plaintiff's case was "difficult" and "undesirable." To  
11 litigate against a social worker in a child endangerment case  
12 would faze many attorneys. Ms. Kaminer initially declined to  
13 take it and later had to forgo or postpone work in other cases  
14 due to this case. Kaminer Decl. ¶¶ 10, 28. The case involved  
15 complex immunity issues, and the law regarding social workers  
16 and their removal and detention of children was evolving.  
17 Plaintiff faced a rigorous defense, as defendants were  
18 prepared to fight all claims and continue to vigorously  
19 appeal, file and oppose post-trial motions. Furthermore,  
20 plaintiff's attorneys accepted the case knowing that plaintiff  
21 was not able to pay fees. They agreed to advance the costs  
22 and take the case on a contingency basis. Kaminer Decl. ¶ 12.  
23 See Fischel v. Equitable Life Assur. Society of U.S., 307 F.3d  
24 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to  
25 fail to apply a risk multiplier, however, when (1) attorneys  
26 take a case with the expectation that they will receive a risk  
27 enhancement if they prevail, (2) their hourly rate does not  
28 reflect that risk, and (3) there is evidence that the case was

1 risky.")(citation omitted). Plaintiff's attorneys accepted a  
2 difficult, undesirable case with the risk they might not be  
3 compensated if plaintiff lost, and obtained a \$220,000 verdict  
4 against a county employee. Had plaintiff's attorneys asked  
5 for a multiplier, I would have recommended granting one. If  
6 converted to a multiplier, plaintiff's requested enhancement  
7 would equal a modest multiplier of approximately 1.2 applied  
8 to Mr. Pyle's and Ms. Kaminer's fees. Therefore, I recommend  
9 that plaintiff's request for a \$75 hourly enhancement to Ms.  
10 Kaminer's and Mr. Pyle's hourly rates be granted.

11 Defendants' arguments that plaintiff's attorneys expended  
12 an unreasonable amount of hours are unfounded. A review of  
13 the timesheets for plaintiff's primary attorneys reveals that  
14 counsel spent time researching, communicating and preparing in  
15 a discovery-intensive case. They faced motions for summary  
16 judgment from all three defendants, and the trial lasted  
17 several days. Ms. Kaminer avers that she did not bill for  
18 discussions and brainstorming sessions with Mr. Pyle, and she  
19 and Mr. Pyle usually billed only for one attorney's time even  
20 if two attorneys participated in the activity. Plaintiff's  
21 attorneys also did not bill for the work performed by one of  
22 their then-associates in helping to prepare the opposition to  
23 the summary judgment motions. Kaminer Decl. ¶ 25. Finally,  
24 defendants' attorneys spent as many, if not more, hours as  
25 plaintiff's counsel did in litigating the case. The number of  
26 hours plaintiff's attorneys spent is reasonable, and I  
27 recommend that they receive fees for all of their claimed  
28 hours.

1 Defendants' arguments that plaintiff is improperly  
2 including time spent for work on unsuccessful claims are more  
3 convincing. I do not, however, agree with defendants'  
4 proposal to cut plaintiff's attorneys' fees by 2/3 since  
5 plaintiff did not prevail against two of the three defendants.  
6 "[C]ourts may not adopt rigid mathematical formulas tying the  
7 lodestar figure to the ratio of defendants remaining at trial  
8 to defendants served in the complaint." Cunningham v. County  
9 of Los Angeles, 879 F.2d 481, 485 (9th Cir. 1989). Courts  
10 address two questions when a plaintiff succeeds on only some  
11 claims. The first question focuses on whether "plaintiff  
12 fail[ed] to prevail on claims that were unrelated to the  
13 claims on which [she] succeeded." Hensley, 461 U.S. at 434.  
14 The second focuses on whether "plaintiff achieve[d] a level of  
15 success that makes the hours reasonably expended a  
16 satisfactory basis for making a fee award." Id. (explaining  
17 that other factors may affect fee adjustments, including the  
18 important factor of the "results obtained" which is  
19 "particularly crucial" where a plaintiff is deemed to have  
20 prevailed only on some claims). In the instant case, all of  
21 plaintiff's claims arose out of a common set of facts but the  
22 claims against the social workers and the County of Alameda  
23 Social Services Agency (the "County") were based on different  
24 legal theories and different actions, so plaintiff's  
25 successful claims were somewhat "unrelated" to her  
26 unsuccessful ones.

27 As for the second question, of the three defendants  
28 plaintiff sued, Hintzen was dismissed at the summary judgment

1 stage several months before trial, on immunity grounds, and  
2 the County was dismissed after the conclusion of plaintiff's  
3 case-in-chief, before the jury received the case, because of  
4 lack of evidence. Plaintiff prevailed only against Karen  
5 Castro but she prevailed on what I perceive to be her  
6 principal claim and the award she obtained was substantial.  
7 Still, some of the work expended in pursuing the claims  
8 against Hintzen and the County was not reasonably expended for  
9 the ultimate result achieved. Requiring one unsuccessful  
10 defendant to shoulder plaintiff's attorneys' fees spent  
11 unsuccessfully pursuing two other defendants on unrelated  
12 claims does not seem fair to Castro.

13 Plaintiff asserts that her attorneys would have had to  
14 perform the same tasks and the same amount of work even if she  
15 had filed an action against only Castro. While there is some  
16 logic to that in many cases, many of plaintiff's claims were  
17 distinct from each other. The claims against Castro focused  
18 on her pre-detention actions and seizure of the children  
19 without a warrant; the claims against Hintzen focused on her  
20 post-seizure investigatory actions to retain the children; and  
21 the County was involved only on Monell grounds. The  
22 timesheets of plaintiff's attorneys often do not differentiate  
23 the tasks performed by specific claim and specific defendant.  
24 While in some instances this may not have been possible, or  
25 might have been unduly time-consuming, there were tasks which  
26 should have been easily distinguishable. For example, much of  
27 the work spent opposing the County's motion for summary  
28 judgment on Monell grounds would seem separable from much of



1 the work done in opposing Castro's motion, which focused on  
2 her immunity from suit. Since the timesheets do not always  
3 permit me to segregate the hours spent in pursuit of  
4 plaintiff's claims against Hintzen and the County, and her  
5 counsel have made no effort to do that, she has not satisfied  
6 her burden to produce adequate documentation of her attorneys'  
7 fees request. Hensley, 461 U.S. at 433. I therefore  
8 recommend cutting plaintiff's attorneys' fees by 25% overall.  
9 See id. ("Where the documentation of hours is inadequate, the  
10 district court may reduce the award accordingly."). In my  
11 experience, this is a reasonable reduction. Gates v.  
12 Deukmejian, 987 F.2d 1392, 1399-1400 (9th Cir. 1992) ("in cases  
13 where a voluminous fee application is filed," a district court  
14 may use across-the-board percentage reductions but should  
15 explain its reduction). Other than to request all of her  
16 attorneys' fees, plaintiff did not make an alternate  
17 suggestion.

18 I am not satisfied that two thirds of the work done on  
19 this case would have been eliminated had plaintiff not sued  
20 Hintzen or the County, as defendants contend. In fact,  
21 defendants' expert opined that plaintiff's hours should be  
22 reduced by one third to account for work done on Hintzen and  
23 the County. My personal review of the record suggests that  
24 one quarter is closer to the mark. The claim against Castro,  
25 that she illegally seized the children, appears to have been  
26 the lead claim. Castro's conduct led to the conduct that  
27 produced the other claims. Much of the preparatory and  
28 investigatory work would have overlapped for all three

1 defendants. This is especially true of the extensive factual  
2 development which this case required, not only for liability,  
3 but also for damages. For example, I have reviewed each  
4 side's statement of facts filed as part of the summary  
5 judgment process. In defendants' motion, the statement of  
6 facts occupies approximately 4 pages of which  $2\frac{3}{4}$ , or  
7 approximately 70%, address the conduct which preceded the  
8 seizure of the children. In plaintiff's opposition, the  
9 statement of facts covers approximately 9 pages, of which  
10 approximately  $6\frac{1}{2}$  pages, or approximately 72%, address the  
11 conduct which preceded the seizure of her children.

12 At oral argument, Ms. Kaminer stated that plaintiff would  
13 have deposed Hintzen as a witness even if she was not a party  
14 to the lawsuit. Ms. Kaminer also stated that plaintiff would  
15 have had to take the same number of depositions, save one  
16 (Bogner), even if plaintiff had sued only Castro. Defendants  
17 would add another (Lee). Clearly, the bulk of the depositions  
18 would have been taken, even had only Castro been sued.

19 In addition, plaintiff is entitled to her attorneys' fees  
20 for work done in connection with this motion. Clark v. City  
21 of Los Angeles, 803 F.2d 987, 992 (9th Cir. 1986). Plaintiff  
22 requests \$40,087.63 for work done by Mr. Hicks and his  
23 paralegal on this motion and over \$20,000 for Ms. Kaminer's  
24 and Mr. Pyle's time. Ms. Kaminer claims 36.6 hours - 4.5  
25 hours for work prior to the filing of this motion and 32.1  
26 hours for work after, and Mr. Pyle claims 32.7 hours - 1.9  
27 hours for work prior to the filing of this motion and 30.8  
28 hours for work after. Suppl. Decl. of Kaminer and Pyle.

1 However, plaintiff is not entitled to work spent on opposing  
2 defendants' motion for attorneys' fees. See Jensen v. City of  
3 San Jose, 806 F.2d 899 (9th Cir. 1986). Therefore, I  
4 recommend deducting 17.5 hours for Ms. Kaminer and 14.2 hours  
5 for Mr. Pyle for work spent opposing defendants' motion for  
6 attorneys' fees. This leaves 19.1 hours for Ms. Kaminer and  
7 18.5 hours for Mr. Pyle. Applying the recommended hourly  
8 rates of \$350 for Ms. Kaminer and \$400 for Mr. Pyle, with no  
9 enhancement, to these hours yields \$6,685 for Ms. Kaminer's  
10 fees and \$7,400 for Mr. Pyle's fees.<sup>4</sup>

11 Mr. Hicks' updating declaration also improperly includes  
12 tasks such as "assistance in [Ms. Kaminer's] opposition to the  
13 defendants' fee motion." Hicks Decl. Updating Fee Appl. 4:6;  
14 4:20-23. On the other hand, it appears that Mr. Hicks spent  
15 the bulk of his time on this motion. Ms. Kaminer, not Mr.  
16 Hicks, drafted the opposition to defendants' motion and Mr.  
17 Hicks did not submit any declarations for defendants' motion.  
18 But because Mr. Hicks fails to include detailed timesheets, it  
19 is difficult to calculate the hours and fees for his and his  
20 paralegal's work which should be compensated. This is  
21 surprising from one who claims \$520 per hour because he is  
22 experienced in filing fee applications. While the one  
23 paragraph summary of his work probably satisfies Civil Local  
24 Rule 54-6(b), it prevents the court from meaningfully  
25 reviewing his claim. From Ms. Kaminer's records, I can deduce

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27 <sup>4</sup> Plaintiff has provided no basis for enhancing the  
28 hourly rates for time spent on this motion and the court is  
aware of none.

1 that she consulted with Mr. Hicks in opposing defendants'  
2 motion for attorneys' fees. While it is conceivable that Mr.  
3 Hicks could have given such advice gratis, an attorney of his  
4 experience should not leave the court in suspense on such an  
5 issue. Accordingly, I recommend that 5 hours (at an hourly  
6 rate of \$520, which would equal \$2,600 in fees) be deducted  
7 from Mr. Hicks' claim. It is my best assessment of the amount  
8 he would have spent in assisting plaintiff's counsel in  
9 opposing defendants' motion. I therefore recommend Mr. Hicks'  
10 claim be reduced to \$37,487.63 (\$40,087.63 - \$2,600.00)

11 Moreover, as with her application for fees for her  
12 attorneys' work on the underlying case, plaintiff is not  
13 entitled to compensation for all of the hours and work her  
14 attorneys spent on this fee motion because she did not prevail  
15 on all of her claims. Therefore, I recommend cutting  
16 plaintiff's attorneys' fees for work on this motion by 25%  
17 overall, the same percentage I recommend for reducing  
18 plaintiff's attorneys' fees for work on the underlying case.  
19 See Schwarz v. Secretary of Health & Human Svcs., 73 F.3d 895,  
20 909 (9th Cir. 1995) ("a district court does not abuse its  
21 discretion by applying the same percentage of merits fees  
22 ultimately recovered to determine the proper amount of the  
23 fees-on-fees award").

24 Finally, plaintiff has also included a request for costs  
25 in her motion; these costs overlap with the bill of costs she  
26 filed on March 13, 2006 [docket # 196]. This aspect of the  
27 motion was not fully briefed, and defendants have requested  
28 that this issue be resolved separately as the parties have

1 filed separate motions and oppositions for taxation of costs  
2 [docket ## 194, 196, 197, 198 and 208]. I have therefore not  
3 included costs in plaintiff's attorneys' fees award. I  
4 recommend that the Clerk be ordered to tax costs by August 11,  
5 2006 and the parties make any objections and motions regarding  
6 the Clerk's taxation under Civil Local Rule 54 and in light of  
7 the court's guidance that plaintiff recover her fees only for  
8 those claims on which she prevailed.

9 Therefore, I recommend plaintiff's motion for attorneys'  
10 fees be **GRANTED IN PART and DENIED IN PART** as follows:

- 11 1. that plaintiff be awarded attorneys' fees against  
12 defendant Castro in the amount of **\$456,436.04** as set  
13 forth on the attached schedule;<sup>5</sup>
- 14 2. that the Clerk of this court tax costs by **August 11,**  
15 **2006** pursuant to Civil Local Rule 54; and
- 16 3. that defendants' objections to plaintiff's evidence  
17 be **OVERRULED**. The bulk of defendants' objections go  
18 to background evidence submitted by plaintiff, and  
19 the qualifications and experience of plaintiff's  
20 attorneys are relevant. To the extent that any of

21 ///

22 ///

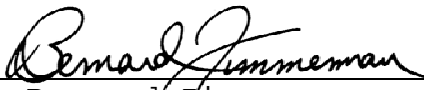
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25 <sup>5</sup> Although plaintiff asked that the award be against  
26 the County, she has provided no authority for doing so.  
27 Plaintiff's supplemental citations address the County's duty to  
28 pay for any judgment against Castro, which is distinct from an  
entry of judgment against the County. The court is unaware of  
any agreement for indemnification among these parties.

1 defendants' objections have any merit, they go to  
2 the weight of the evidence.

3 Dated: July 31, 2006

4   
5 Bernard Zimmerman  
United States Magistrate Judge

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Attachment 1

<u>Attorney</u>	<u>Requested Hourly Rate</u>	<u>Awarded Hourly Rate</u>	<u># of Hours</u>	<u>Total</u>
<b><u>Attorneys' Fees for Case-in-Chief</u></b>				
Kaminer	\$410	\$425 <sup>1</sup>	899.85 <sup>2</sup>	\$382,436.25
Pyle	\$450	\$475 <sup>3</sup>	354.7 <sup>4</sup>	\$168,482.50
Beauvais	\$350	\$350	17.4	\$6,090
			Subtotal	\$557,008.75
			less 25% <sup>5</sup>	\$139,252.18
			Subtotal	\$417,756.57

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<sup>1</sup> \$350 rate + \$75 enhancement

<sup>2</sup> 904.35 hours - 4.5 hours (Ms. Kaminer's claimed time spent up to time of filing of plaintiff's attorneys' fees motion **minus** 4.5 hours for work done on plaintiff's attorneys' fees motion)

<sup>3</sup> \$400 rate + \$75 enhancement

<sup>4</sup> 356.6 hours - 1.9 hours (Mr. Pyle's claimed time spent up to time of filing of plaintiff's attorneys' fees motion **minus** 1.9 hours for work done on plaintiff's attorneys' fees motion)

<sup>5</sup> to be reduced for plaintiff's unsuccessful claims

<b><u>Attorneys' Fees for Fees Motion (inc. updated hours)</u></b>				
Kaminer	\$410	\$350 <sup>6</sup>	19.1 <sup>7</sup>	\$6,685
Pyle	\$450	\$400 <sup>8</sup>	18.5 <sup>9</sup>	\$7,400
Hicks	\$520	\$520	38.5	\$20,020
Paralegal	\$110	\$110	5.1	\$561
Hicks Supplemental or Updated Fees				\$16,906.63 <sup>10</sup>
			Subtotal	\$51,572.63
			less 25% <sup>11</sup>	\$12,893.16
			Subtotal	\$38,679.47
			<b><u>TOTAL AWARD</u></b>	<b>\$456,436.04</b>

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<sup>6</sup> no enhancement

<sup>7</sup> 4.5 hours + 32.1 claimed hours - 17.5 hours (hours up to time of filing of fee application **plus** updated hours for time after filing of fee application **minus** time for work on opposing defendants' attorneys' fees motion)

<sup>8</sup> no enhancement

<sup>9</sup> 1.9 hours + 30.8 claimed hours - 14.2 hours (hours up to time of filing of fee application **plus** updated hours for time after filing of fee application **minus** time for work on opposing defendants' attorneys' fees motion)

<sup>10</sup> reflecting a reduction of \$2,600 (5 hours x \$520) from the requested amount of \$19,506.63 for Mr. Hicks' work done in opposing defendants' motion for attorneys' fees

<sup>11</sup> to be reduced for plaintiff's unsuccessful claims



